

1 before the Court, and I just want to clarify that the issue
2 before the Court today is not the validity of the claims or
3 even whether the claims exist after confirmation of the plan.
4 The only issue before the Court today is whether or not the
5 RCT or the PCT is entitled to bring these causes of action.
6 And I think if we kind of narrow the scope and kind of look
7 at that and see what we can all agree on, maybe we can kind
8 of come to an understanding as to where this is going. I
9 think there is agreement that this question can be answered
10 by looking at the plain language of the plan. Everybody
11 agrees on that. Everybody agrees that if it is an RCT asset,
12 it is not a PCT asset, that there's no overlap between the
13 two parties. If one party owns it, the other does not. Then
14 we're left with looking at what I'll call the understanding,
15 which people have talked about as to what was the purpose;
16 what was the background; how did we get here? Well, Your
17 Honor's been involved in this case -

18 THE COURT: Well, do I look at even the purpose and
19 understanding and expectations of the parties if the language
20 is plain?

21 MR. MILLER: I think that the language is clear, and
22 we can just stay with the language, and I guess take it for
23 what it's worth, because I do agree with Your Honor, if the
24 language is clear you really don't need to go beyond that.
25 And I think that the language, when you look at the language,

1 the language does demonstrate the intent. It's not a
2 question where there's ambiguity and you have to look at what
3 the language, the intent was, but the language is clear
4 because it was intended to keep these assets separate and
5 with that understanding - And it's more of a background to
6 take recognition of the fact that from day one, the
7 reclamation creditors and the debtors had big disputes.
8 There was a procedure set up to deal with the reclamation
9 creditors. Then that wasn't the appropriate way to do it.
10 They filed a motion to deal with how we're going to deal with
11 the reclamation creditors and the whole valueless argument,
12 and it was decided that's not the appropriate way. What we
13 have to do is we have to file adversary complaints. So, a
14 whole slew of adversary complaints were filed, and there was
15 discussion as to whether people, you know, certain parties
16 had to intervene, and there was a lot of issues going on, and
17 at the end of the day, this Court in its wisdom decided to
18 appoint an Official Committee of Reclamation Creditors to
19 deal with these issues, to try to get some closure and get
20 this thing moved along. And it worked out great. There was
21 a commission - There was a Committee appointed to represent
22 the reclamation creditors. There was an Official Committee
23 of Unsecured Creditors. The debtors were represented, and
24 they came together with this plan. And so, they took
25 everything together, and they came up with a plan that would

1 resolve the issues, and that's all set forth in the plan.
2 This is how they resolved everything. And I think if we take
3 that into account, and the animosity that was there, and we
4 recognize that if it's a PCT asset, it's not an RCT asset.
5 If it's an RCT asset, it's not a PCT asset. And we go from
6 there, and we look at what's actually said, and I think that,
7 you know, everybody's focused on the key word. It's
8 "indirect". And Your Honor's asked the question, well, what
9 about Deloitte. What if Deloitte were to bring an action
10 against the vendor? First of all, the only question before
11 the Court, the only one we're concerned about is the debtor
12 had this whole bundle to begin with, and then it split it out
13 to two different parties. It split it to the RCT and the
14 PCT. And the question is, if the debtor was a single party
15 and brought this action, they would be suing the reclamation
16 vendors and the employees together. We're not in that
17 situation -

18 THE COURT: And Deloitte, and the former officers
19 and directors.

20 MR. MILLER: Everyone. We're not in that situation.
21 Now, what we have is a party that had that whole bundle of
22 rights saying, Well, what we really did is the action against
23 the employee, we're going to send over here, and the action
24 against the vendor, we're going to send over here, and we're
25 going to give it to two different people. And to me, as -

1 and I don't want to repeat what other people have said, the
2 only way that these entities can act is through their
3 employees. The acts of Deloitte, if Deloitte were to say
4 that they had a contribution right against the vendors, that
5 has nothing to do with the issue before the Court today. I
6 don't think there's any reclamation vendor that is arguing
7 that that somehow would become an RCT asset, and we're
8 getting absolved of that liability. We have to deal with
9 that, because that's not - that was not the debtor's right to
10 begin with. The debtor's right is the right against the
11 reclamation vendor and its employee who acted on behalf of
12 the reclamation vendor.

13 THE COURT: Right, but it's the reclamation
14 employee's claim for indemnification from the reclamation
15 creditor was not a debtor right either that was given away.
16 Really, indemnity and contribution are quite similar in this
17 analogy.

18 MR. MILLER: Right. If they were to bring an action
19 against us, that would be a direct cause of action.

20 THE COURT: Against whom?

21 MR. MILLER: If the PCT were to bring an action
22 against my client Kemps, that would be a direct cause of
23 action. They've not done that. What they have done is
24 brought in indirect - I'm not sure, as other parties have
25 said, what would constitute an indirect cause of action

1 against the vendor.

2 THE COURT: Why isn't the action against Deloitte an
3 indirect cause of action against the reclamation creditors
4 then?

5 MR. MILLER: I'm not sure I understand how you get
6 to that point.

7 THE COURT: Because they have a right of
8 contribution. If they can establish that the reclamation
9 creditor's employee was part of this fraud.

10 MR. MILLER: But that would be Deloitte's right.

11 THE COURT: Yes, and the employee's right of
12 indemnification is the employee's right. And if Deloitte had
13 a right of contribution against the reclamation creditor, it
14 would be for the same actions. It would be for the actions
15 of their employee in committing this fraud, if they had that
16 right.

17 MR. MILLER: I'm trying to figure out a way to -
18 we're at different positions as to how we view the word
19 "indirect" and who's entitled to the ability to -

20 THE COURT: An indirect claim is a claim that I
21 might not have against you directly, but that I have against
22 you.

23 MR. MILLER: It's an indirect claim by the debtor.
24 That's the party that we're talking about. It's the debtor's
25 indirect or direct cause of action or derivative cause of

1 action or whatever against the reclamation creditor.

2 THE COURT: The debtor's claim against the
3 individuals -

4 MR. MILLER: Is a direct claim.

5 THE COURT: Is a direct claim against the
6 individuals.

7 MR. MILLER: That's correct, and an indirect.

8 THE COURT: And it's not an indirect claim against
9 the reclamation creditors. They have a direct claim against
10 the reclamation creditors for those same actions.

11 MR. MILLER: But - I agree, they do. They also have
12 an indirect by bringing the action against the individual,
13 that individual having a right of indemnification, it results
14 in an indirect cause of action against the vendor.

15 THE COURT: No.

16 MR. MILLER: And, pursuant to law, he's entitled to
17 his right of indemnification. For example, if he was not
18 within the scope of employment, and he did not have the
19 ability to get indemnified, and they were only going after
20 the individual, and there was no way that my client could be
21 liable under any theory, that would not be an indirect cause
22 of action.

23 THE COURT: That would be -

24 MR. MILLER: That would just be a direct cause of
25 action against the individual with no indirect liability

1 against my client.

2 THE COURT: An indirect claim is a claim that I do
3 not have against you directly.

4 MR. MILLER: Right.

5 THE COURT: But because of some theory of law, I'm
6 allowed to bring against you - it's a claim of somebody else
7 whom I represent. It's a derivative of somebody else's right
8 - that's what an indirect claim is, but it's a claim against
9 you. It's not a claim that I have against a third party that
10 might somehow indirectly affect you. That's not what an
11 indirect claim is.

12 MR. MILLER: I think that we shouldn't lose sight of
13 the words that are used there. It's not merely direct,
14 indirect, derivative, it says, or otherwise. The point is
15 that -

16 THE COURT: Against persons, but it's against
17 persons.

18 MR. MILLER: This is supposed to be expansive, and I
19 think that's where you have to start from. The whole point
20 of this is to be as expansive as possible. What would be - I
21 guess I would throw a question out to Your Honor. What would
22 be the intent of having a plan where you would have a
23 provision where you would have one cause of action against
24 the vendor and the cause of action against the employees who
25 caused the vendor's liability, so to speak, to go to another

1 party so that two trusts could sue and result double the
2 damages, double the amount?

3 THE COURT: Well, they won't get double recovery.

4 MR. MILLER: Why? If you have one party -

5 THE COURT: Because you only have to pay once.

6 MR. MILLER: Not if they take inconsistent
7 positions. If the RCT takes a position that there is no
8 liability, and the PCT takes the position that there is
9 liability, those are inconsistent results.

10 THE COURT: Well, there may be no liability on the
11 direct claim because the RCT waived it or whatever for
12 whatever reason, but that does not implicate the direct claim
13 against Deloitte or the employees or the former officers and
14 directors. If you were to suggest that the fact that the RCT
15 felt there were no merit to the claim, it would implicate the
16 actions against everybody else.

17 MR. MILLER: And that's why one party should have
18 it, and it's very clear that as against the reclamation
19 vendor, it goes to the RCT.

20 THE COURT: All claims against the reclamation
21 vendor went to the RCT. Let me turn this around in a
22 situation that you will understand as a bankruptcy
23 practitioner. Company files bankruptcy. Gets a discharge.
24 Creditors can still sue the officers and directors of the
25 debtor for actions they took within the scope of their

1 employment to the extent that the creditor can establish they
2 have a direct claim against the employees for their damages.
3 The discharge of the debtor does not discharge the officers
4 and directors unless there's a specific release provision or
5 otherwise. Turn that around here. Isn't that the same here?
6 The release of a claim against the vendor does not release
7 any claims against the vendor's employees, unless there's
8 express language, and I'm always careful on plans to make
9 sure the release language is expressed. So, I don't see it
10 here. I see the definition of person as being the
11 reclamation creditors, only includes them, not their officers
12 and directors.

13 MR. MILLER: Let's take a look at the plan, first.

14 THE COURT: I agree cause of action was meant
15 broadly, but the RCT assets was not meant to encompass
16 anything except causes of action or claims as broadly as they
17 may be defined against reclamation creditors.

18 MR. MILLER: I'm not sure that I have anything that
19 - I think it's a different reading that obviously the two
20 parties had as to the documents. I have nothing further,
21 Your Honor. Thank you, Your Honor.

22 MR. FRIEDMAN: May I make one brief final point -

23 THE COURT: Let your colleague speak first.

24 MR. RALSTON: Your Honor, I'll be brief. I just -
25 One, I wanted to apologize. Mark Ralston on behalf of Dean

1 Foods Company. I failed to identify myself, and I apologize
2 to the court reporter.

3 THE COURT: Thank you.

4 MR. RALSTON: I was the person, who, for the record,
5 followed Mr. Friedman on the opening. Again, Your Honor,
6 I've been writing lots of notes, and I'm going to try to
7 avoid rehashing issues, and I'm prepared for this Court's
8 very direct questioning. Albeit, I wasn't born there, I'll
9 just claim to be a simple Texas lawyer who doesn't understand
10 some of the things that have been going on, and here's how I
11 kind of boil it down. Just as a hypothetical situation,
12 perhaps outside the bankruptcy context, "A" alleges a tort
13 against a corporation and various officers or employees
14 alleging acting within the scope of their corporate
15 authority. "A" then assigns the causes of actions against
16 officers and directors against "B". So "B" has the claims
17 against the individuals, the real people. "A" keeps the
18 claim against the corporation. "A" brings the lawsuit in one
19 jurisdiction. "B" brings the lawsuit in another
20 jurisdiction. As is standard with every corporation, there
21 is a contractual obligation to indemnify. As I understand
22 it, I'm not a corporate lawyer, it's generally within the
23 formation documents, articles, or by-laws, or what have you,
24 and it's alleged by the plaintiffs in both lawsuits, and I
25 kind of wonder, that can't happen. I mean there just can't

1 be the opportunity where the corporation, which is a solvent
2 corporation, is going to have to deal with "A" on the direct
3 claims and "B" and again, I know the Court has through its
4 questioning indicated a reluctance to adopt the view of the
5 RCT and the other vendors here today, but it seems to me
6 that's clearly an indirect claim. Especially when plaintiff
7 "B" is alleging that the officers and other employees are
8 acting within the scope of the corporate authority and
9 alleging as a count that there is a duty to indemnify. I
10 think we parse over the words "indirect" and I have - I'll
11 get to why I disagree with the Court or I may disagree with
12 the Court's view of what that word means.

13 THE COURT: Well, indirect, but is it an indirect
14 claim against the corporation, I think, is the operative.

15 MR. RALSTON: And I think it is an indirect claim,
16 and the fact of the matter is, think the Court has a very big
17 concern. Well, does the corporation create the indirect
18 claim by contractually indemnifying the officers and
19 directors? And the answer is, Yes. The corporation, like
20 every corporation, creates those indirect claims, and again,
21 both sides have to live with what the plan says. If that was
22 a concern of the - It's not the PCT because the PCT has made
23 it clear they're not the debtors. They're not the Official
24 Committee of Unsecured Creditors. But those were the parties
25 who negotiated the plan along with the predecessor to the

1 RCT, which is the Official Committee of Reclamation
2 Creditors. And if the parties, the debtors and the Official
3 Committee of Unsecured Creditors were concerned about
4 entities having created indirect claims through contractual
5 obligation to indemnify, I guess they should have done that
6 in the plan, but I can't, again, being just a simple Texas
7 lawyer, I can't understand what the word indirect means
8 except that your ultimate source of recovery as pled by the
9 plaintiff. I mean there's not even a dispute as to by the
10 PCT that there's a duty to indemnify. It's their allegation
11 that the ultimate source of recovery is a solvent
12 corporation. I grant you there is a direct claim against the
13 officer, but that direct claim is inexorably linked to the
14 indirect claim against the corporation, and the fact of the
15 matter is - I'm sorry, about the hand movement, Your Honor -

16 THE COURT: That's all right.

17 MR. RALSTON: - I'm trying to explain it. The way
18 the plan works, all claims against the reclamation creditor,
19 even if you go to the Reclamation Committee, if those claims
20 are inexorably linked to indirect claims - to claims against
21 others, they still go because those are indirect - the
22 indirect claim against the corporation is a cause of action,
23 it goes to the RCT. If some claims are otherwise pulled
24 along with it that the PCT might have a chance to bring,
25 sobeit. It's in the camp of the RCT. That's what was

1 negotiated by the parties that existed before the
2 confirmation and effective date. And quite honestly, I get
3 back to my hypothetical, not only does Dean Foods believe
4 that that is the correct interpretation of the word indirect,
5 plain meaning, what have you, giving effect, because we
6 wouldn't see how you would give effect to that word any other
7 way. But apart from that, it seems to me consistent with the
8 notion of fairness that has to be part of this Court's
9 concern, that this is an equitable process. Essentially,
10 what the PCT is arguing is that, yes, in my hypothetical, "A"
11 should be able to assign its claims to another entity, and
12 they both should be able to recover knowing full well that
13 there's an indemnification obligation of the corporation,
14 even though it's not a named party. I mean, you know -

15 THE COURT: Well, I'm struggling with that too. Why
16 shouldn't they both be able to recover? Because -

17 MR. RALSTON: I just don't see how that - and, Your
18 Honor, I'll be happy to assign one of my smarter associates
19 to the task of finding out why, if I'm asserting a corporate
20 tort - and you always have the same lawsuit, you know.
21 Usually it's the corporation is going to be there and you're
22 going to throw in a few officers because you want to get
23 their attention; right? There's got to be something out
24 there, and I'll be happy to try to find it, and perhaps this
25 Court wants to have some post-hearing briefing, why, if I had

1 a cause of action for a corporate tort, why can't I assign it
2 to my brother Brian, you know, the cause of action and we can
3 both recover and make out like bandits. I presume the
4 plaintiff bar, if they could to that, would be doing it in
5 every case. So, I just don't know offhand. I can't cite,
6 you know, a case law, probably because it's so outrageous
7 that no one's tried it before, and maybe we discovered a new
8 way for the plaintiff's bar to, you know, to make some money.
9 But I just don't see how that could be - and getting to my
10 colleague on the vendor side's argument, that can't be a
11 reasonable interpretation of this plan. I mean, in reading
12 it, I think you would have to - I use the term in our brief,
13 through the artifice of drafting, create the situation where
14 there is a double recovery. I don't think that's the case,
15 and I'm not accusing anyone of trying to do that, and I think
16 when you look at the language and that indirect has to have
17 some meaning, and you look at the purpose of the plan as a
18 backstop, there only can be one conclusion, and in this
19 particular case where the actions of the vendors and their
20 officers are allegedly one and the same, including the
21 intent, the actions, complete overlay, and that there's an
22 indemnification obligation as alleged by the PCT. That has
23 to be an indirect claim. As to Deloitte, counsel for the RCT
24 mentioned - excuse me, PCT mentioned that, you know, there's
25 also issues in Texas of comparative liability. So

1 contribution isn't necessarily an issue. Deloitte,
2 presumably, would take the position, if we are liable, we're
3 only liable for a small percentage because all the bad acts
4 were committed by Fleming's directors and officers, and I
5 presume that they're aware of the SEC issues and by these
6 vendors. And so, if there is any liability, we've got a
7 little chunk, and so the judgment is for a comparative
8 negligence or gross negligence, and it's limited. So, I
9 think that -

10 THE COURT: So, it's not joint and several?

11 MR. RALSTON: Well, again, with the officer and the
12 company there's a complete overlay with the actions. I don't
13 even believe that the causes of action against Deloitte are
14 the same causes of action asserted against the officers of
15 the vendors.

16 THE COURT: Let's take the debtor's officers and
17 directors, which are.

18 MR. RALSTON: Right.

19 THE COURT: They were the other side of the
20 transaction -

21 MR. RALSTON: Right.

22 THE COURT: - the alleged fraud committed with your
23 employees.

24 MR. RALSTON: Right.

25 THE COURT: It's all alleged.

1 MR. RALSTON: Alleged, and again, for purposes of
2 the record, can I adopt all of the legal argument of my
3 colleagues.

4 THE COURT: Yes, and for purposes of the record,
5 I've made it clear this is all allegations.

6 MR. RALSTON: Thank you, Your Honor.

7 THE COURT: But, I mean, the director's officers and
8 directors were the other side of the transaction.

9 MR. RALSTON: Correct, and I presume that they could
10 say even though we - even though it's alleged that our torts
11 were intentional, that we were aided and abetted. I - you
12 know, we can get into a lot of hypotheticals, and there could
13 be some good law review questions here, again, to echo,
14 though it's not before the Court. We haven't crossed that
15 bridge. No contribution claim has been filed against Dean
16 Foods or any of the other vendors, if I'm correct. And so,
17 yeah, we could get to some gray areas, perhaps. This is not
18 a gray area. This is a black and white area, at least as we
19 view it. Now, in response to your hypothetical, presenting,
20 I think, more of a gray area -

21 THE COURT: Your's is more direct than the indirect
22 claims that Deloitte and the Fleming officers and -

23 MR. RALSTON: Well, ours is - Well, I don't want to
24 say more direct because it doesn't have to be direct. The
25 plan says indirect. So, ours is - the claims as I see them,

1 Your Honor, are -

2 THE COURT: But I'm suggesting that the Deloitte and
3 the Fleming officer and director claims over and against the
4 employees might be just as indirect -

5 MR. RALSTON: As a practical matter -

6 THE COURT: - as yours.

7 MR. RALSTON: - I think they can take care of that
8 through comparative negligence as far as Deloitte, okay, as a
9 practical matter, if the Court is concerned with the
10 practical implications. Presumably, as I stated earlier,
11 Deloitte did not feel strongly about that defense because the
12 RCT indicated - excuse me, the PCT indicated that it had
13 settled with Deloitte, and I believe they stated to this
14 Court that it was a confidential amount, but they were happy
15 with it. So, since they're happy with it, I'm going to
16 assume that they got a good settlement, and since they got a
17 good settlement, and since I assume that Deloitte was
18 adequately represented by counsel, Deloitte didn't feel very
19 strongly that comparative negligence, a comparative claim
20 against a vendor would really do it justice, and I happen to
21 agree because, you know what, it's a gray area, but, you
22 know, it's one of those areas where you say, you're getting a
23 little far afield of what the situation here is. Here I
24 think you're saying, Wait a minute. Again, back to my
25 hypothetical, my "A" and "B" hypothetical, that seems to me

1 to implicate the word indirect as clearly as you could.
2 Plaintiff alleges that officer did wrong. Plaintiff alleges
3 that officer acted within the scope of its corporate
4 authority. Plaintiff alleges duty of indemnification of
5 corporation even though they're not a named defendant. Yes,
6 they can't bring a named defendant in because that's the word
7 direct in the cause of action, and the direct claim has gone
8 to the RCT. But along with that direct claim is the indirect
9 claim against the vendor, and that indirect claim is
10 essentially what's implicated by the action against the
11 individual. And then again you get to the "A" and "B". It
12 only make sense that that's the case because otherwise you
13 get a potential for double recovery that at least to my
14 knowledge you don't have outside the bankruptcy process, and
15 if the bankruptcy plan created the situation of a double
16 recovery, it did so, I think, under a cloud without full
17 disclosure and essentially impugning the equitable nature of
18 this process. So, we may parse over the words. I think that
19 ours clearly is the correct reading of the plan, but, Your
20 Honor, if there is - if the Court needs to look at the
21 entirety of the plan to give the words effect, I think that's
22 the only - the RCT's position is the correct one. One of the
23 issues on the indirect, and this is a nit, Your Honor, I
24 don't quite understand, and maybe I'm missing something,
25 won't be the first time and it won't be the last, excuse me,

1 as I understood the PCT's position, the indirect meant that a
2 creditor could not bring a claim against a reclamation
3 creditor. Now, I think, as I - and this Court may have
4 answered some of my questions, if that creditor had a direct
5 claim against a reclamation creditor, I don't think the plan
6 effectuates a third-party release. In other words, if a
7 creditor were to have said that a vendor misrepresented
8 something to that creditor and then reliance upon that
9 misrepresentation, the creditor extended trade creditor or
10 lent money, that to me is a direct claim of the creditor, and
11 that's not a property of the estate. So that is unaffected
12 by the plan, and therefore, the definition of indirect
13 proposed by the PCT can't be accepted because it wouldn't
14 work in the first place.

15 THE COURT: Well, it's an indirect claim that the
16 estate would have. Perhaps by virtue of the fact that the
17 estate is a creditor through some other machination.

18 MR. RALSTON: So, that's a slightly different form
19 of claim. In my hypothetical the claim was one where the
20 creditor had suffered particularized harm as opposed to the
21 body of creditors.

22 THE COURT: Right.

23 MR. RALSTON: To me, as a matter of law, at least in
24 the Fifth Circuit and I presume the Third Circuit's the same,
25 causes of action that would otherwise be brought by creditors

1 on behalf of an entity, vest with the entity upon filing a
2 bankruptcy. You know, the classic being the fraudulent
3 conveyance or transfer causes of action. Again, therefore,
4 the definition that the PCT proposes for the term indirect
5 has no effect because as a matter of law, those claims vest
6 with the estate and there's no standing for a creditor to
7 bring a derivative type claim. So, if the word indirect is
8 going to be given any meaning, I think it's the RCT's - the
9 meaning that the RCT and the vendors ascribe to that word,
10 and I guess, Your Honor, we can parse over the words, but,
11 you know, I don't know if it was Oliver Wendell Holmes who
12 said it, but, if it looks like a duck, it walks like a duck,
13 and it talks like a duck; it's a duck. And, Your Honor, what
14 we've got here is a duck. Thank you.

15 THE COURT: Thank you.

16 MR. FRIEDMAN: May I make one responsive comment?

17 THE COURT: You may.

18 MR. FRIEDMAN: We're all trying to satisfy Your
19 Honor's concerns that when you look at the - in trying to
20 articulate our basis for differentiating between claims of
21 Deloitte and claims against these individuals, when you read
22 the complaint of the PCT against Deloitte, you look at those
23 allegations, there is nothing in those allegations or that is
24 necessary in those allegations that establishes the liability
25 of a reclamation creditor. There are allegations against

1 Deloitte for its own alleged wrongdoing. So, it is then
2 Deloitte that is asserting contribution. It's not a claim of
3 any kind, direct, indirect, derivative, otherwise of the
4 estate. When you have the claim against the employee, you,
5 in effect now, let's assume there's been a determination of
6 an employee's fault to a percentage or a sum; okay? You've
7 then got the ability, I think as Your Honor has acknowledged,
8 to recover that one time. Can't recover that twice. So now
9 you have a situation where there is a specific issue as to
10 what value has been derived from the reclamation creditor for
11 the benefit of these two estate vehicles and what has not.
12 So now you've already got an issue. I mean, let's assume
13 whether it's through litigation, it's through settlement, or
14 otherwise. I mean, through litigation you obviously have the
15 - you do have the specter of competing claims moving through
16 the process to result. But let's say you've got a result.
17 Then you've got within, let's assume that everything is
18 settled between the reclamation creditor and the RCT, now
19 you've got an issue in litigation brought by the PCT. What
20 is the value of what the RCT derived? And you have
21 litigation looking at, again, what was the benefit that the
22 estate might have derived from a settlement? In some cases
23 it might be easy. It might be dollars, and some -
24 segregated, and some cases it might not be so easy. Judging
25 from this process, it's going to be a complicated issue, but

1 be that as it may, that has to involve the reclamation
2 creditor in a way that's different from a situation against
3 Deloitte. Plus, just looking at the allegations, by alleging
4 that someone acted within the scope, there are the direct
5 allegations that create reclamation creditor liability, which
6 you don't have in allegations against Deloitte. Whenever
7 you're alleging -

8 THE COURT: Well, let's not use Deloitte. Let's use
9 the allegations against Fleming's directors and officers who
10 participated with the reclamation creditors in this alleged
11 fraud. I mean they're the same. So -

12 MR. FRIEDMAN: Well, it's - I wouldn't say they are
13 the same, because I don't think that the liability of the
14 Fleming officers and directors stands on whether the
15 reclamation vendors themselves or the reclamation vendors'
16 employees have liability.

17 THE COURT: No, but I'm positing the allegations are
18 they both participated in this fraud, and therefore, I'm
19 positing that, as you say, we get a judgment against
20 everybody who participated in this alleged fraud, now you
21 have joint and several liability, all for the same actions.
22 I mean -

23 MR. FRIEDMAN: Yes, and if you - Well, whether you
24 may or may not, depending on what the relevant state law is,
25 but certainly whatever piece gets applied to the employee

1 it's the same piece that would get applied to the employer.

2 It's not -

3 THE COURT: I thought I heard it was joint and
4 several liability, so it's a hundred percent. Now, we all
5 agree that you can't recover more than a hundred percent, but
6 it does not mean that you can't get a hundred percent
7 judgment against every single one of the defendants.

8 MR. FRIEDMAN: Right, but whatever you can recover,
9 whatever the exposure is of the employee, it's the same
10 exposure -

11 THE COURT: A hundred percent.

12 MR. FRIEDMAN: - a reclamation creditor has.

13 THE COURT: It's a hundred percent.

14 MR. FRIEDMAN: We assume that's a hundred percent,
15 and now you've got the issue to be litigated over what was
16 the value of what was given to the RCT and the fact that both
17 could then be - from the get-go, going after the same issue.
18 So, you've got that specter of the duplicate exposure and the
19 duplicate cost, and then at the back end you've got the issue
20 of, Okay, well, what was recovered from one as opposed to the
21 other? I think that those problems demonstrate why the
22 language should be read to give meaning that it's looking at
23 what the exposure ultimately is and relates to the
24 reclamation creditor not for a meaning that wouldn't - for
25 which those words don't need to be there. In order to say

1 that someone from the estate can bring a derivative claim,
2 that doesn't need to be in a plan that exists already. It's
3 a property of the estate.

4 THE COURT: There's lots of things in this plan that
5 probably didn't need to be there. I know lawyers over-
6 lawyer.

7 MR. FRIEDMAN: Right. That's - But what needed to
8 be there was where it went, and that's our construction,
9 those words have meaning in terms of where a claim goes not
10 whether it belongs to the estate or doesn't belong to the
11 estate. Thank you.

12 MR. BERGER: Good morning, Judge. Neal Berger for
13 FMG. I know you heard from Ms. Pertchard, but I will be
14 brief. I want to comment only on the question that Your
15 Honor posited which is, What's the difference between a
16 direct action against the Fleming officers, one that
17 continues after the corporate entity files a bankruptcy, and
18 one against the individual employees? The difference, Your
19 Honor, is that against the background of the pleading and
20 what's being asserted here, the officers and directors of
21 Fleming allegedly perpetrated a fraud. They're acting
22 outside of the scope of their employment. The vendor
23 officers, like Mr. Frank, the officer in question here, is
24 alleged to be acting within the scope of his employment.
25 There's indemnification when liability is asserted or fixed

1 in a case for actions taken within the scope of employment.
2 There isn't indemnification when someone is acting outside of
3 the scope and commits a fraud.

4 THE COURT: But, I think in my positing my analogy,
5 I was not thinking necessarily of a situation where it was
6 only limited to actions against directors and officers that
7 are not covered by indemnity. Even actions against directors
8 and officers which are covered by indemnity, are not
9 discharged in a bankruptcy. Those actions can continue.

10 MR. BERGER: They can, but in those instances - Your
11 Honor's correct, in many instances a corporate entity files
12 an 11 and you see actions continuing against officers and
13 directors. Sometimes there's a request for relief from the
14 stay because claims against D&O policies may exceed, and -

15 THE COURT: Right, right.

16 MR. BERGER: - you get into distributive and Mandel
17 issues. But in this instance you have something that
18 happened before the petition was filed, before that event
19 happened, and what happened here was the implementation
20 through negotiation of a plan that had a bar to actions and
21 indirect actions and here, what our position, and you heard
22 it from a number of parties, is that this is an indirect
23 attempt to achieve a recovery from a reclamation creditor.

24 THE COURT: But that's why I'm pressing you on that.
25 Isn't this exactly - a discharge discharges a company from

1 all claims, direct indirect, derivative, et cetera, which
2 somebody may have against that company, but it's never been
3 suggested that the discharge means that the officers and
4 directors who have indemnity claims against the debtor are
5 discharged of those claims.

6 MR. BERGER: But just the opposite is what's
7 happening here in the Texas pleading. They're saying, we
8 don't have an action against FMG.

9 THE COURT: Right.

10 MR. BERGER: But FMG took actions because of its
11 employees did X, Y, and Z.

12 THE COURT: Right.

13 MR. BERGER: And FMG is going to be responsible.
14 That's what they're saying in their complaint. The
15 reclamation creditor is the party that's responsible.

16 THE COURT: Right.

17 MR. BERGER: Only in response to what we've had, the
18 procedure brought here, are we hearing, well, there may be an
19 independent cause of action, I don't know if there is or
20 there isn't, but ultimately in the pleading, as it stands
21 today, this PCT is looking for a recovery against FMG.

22 THE COURT: No, it isn't. No, it isn't. It hasn't
23 sued you. You're not a party.

24 MR. BERGER: But the pleading does say, Your Honor -

25 THE COURT: Says that you're responsible for your

1 employee.

2 MR. BERGER: That we're responsible - no, no. That
3 we're responsible for the damages.

4 THE COURT: Okay. You want me to direct that they
5 strike that paragraph?

6 MR. BERGER: No, no, Your Honor, I'm not asking for
7 that.

8 THE COURT: I didn't think -

9 MR. BERGER: But I think that was an important
10 distinction between the Fleming officers and our officers,
11 the distinction is that those officers, the Fleming officers,
12 are acting outside of the scope. Ours are acting within the
13 scope.

14 THE COURT: Yeah.

15 MR. BERGER: Thank you, Judge.

16 THE COURT: Thank you.

17 MR. HILDEBRAND: I'll try and briefly take another
18 pass.

19 THE COURT: Okay.

20 MR. HILDEBRAND: Your Honor, there is a single
21 injury to the debtors allegedly caused by the actions of a
22 Kraft employee, John Kenneth Adams. And I think the question
23 before you today is, who has a right to recover for that
24 injury under the plan? Is it the RCT? Or the PCT? Kraft
25 cannot act in this matter except through its agent who caused

1 the alleged injury. The fact that there may be separate
2 causes of action against both the company and the individual
3 to recover for that single injury to the debtors does not
4 mean they can be peeled apart. It's still one right of the
5 debtors to recover for whatever injury was caused to them by
6 the acts of Mr. Adams, and the plan clearly assigned that
7 piece of the drama to the RCT. Now, it didn't assign
8 Deloitte's piece to the RCT. It did not assign the vendor
9 officers' piece to the RCT, but it did assign Mr. Adams'
10 piece to the RCT because Mr. Adams is a Kraft employee, and
11 that injury is the same thing that Kraft negotiated with the
12 RCT. It's the same injury. It also happens to comport with
13 the intent and the language of the plan, the intent of the
14 reclamation creditors in bargaining for dealing with a single
15 entity. So that's the simplest way I can describe our
16 position. We think it's supported by the plain language, and
17 we would ask you to go that way.

18 THE COURT: Well, unfortunately, I agree with the
19 PCT. I think that the plain language of the plan provides
20 that only causes of action or claims against reclamation
21 creditors were transferred to the RCT, and I view a claim
22 against the vendors, the reclamation creditors, as separate
23 from the claims against the employees albeit that they arise
24 from the same actions and result in the same injuries. They
25 are separate claims, and there was no assignment to the RCT

1 of any claims which the estate may have against employees of
2 the vendors. I think my analogy to the effect of a discharge
3 and to the difference between claims against a debtor and
4 claims against a debtor's officers and employees is just as
5 applicable here. I don't know the answer on the double
6 recovery, but I seem to recall from my law school days that
7 there is some concept that would preclude a double recovery
8 on a claim to the extent there's joint and several liability
9 that does not mean the plaintiff may recover a hundred
10 percent from each of the defendants. I recognize that it may
11 be difficult to parse out what percentage of that claim has
12 already been paid by any reclamation creditors who have
13 settled with the RCT, the RCT claim, a direct claim against
14 them for these injuries, but I leave that for another court,
15 another forum to decide. Again, my comments are premised on
16 allegations. I make no comment as to whether any of these
17 claims have any validity at all. I only determine that the
18 plan did not - or did retain with the PCT the causes of
19 action which the estate may have against the employees of the
20 reclamation vendors. Well, I'll look for a form of order to
21 that effect.

22 MS. PATRICK: May I approach, Your Honor?

23 THE COURT: Yes.

24 MS. PATRICK: Because I could hand it to your clerk
25 or to you?

1 THE COURT: You may hand it to me. Is this the
2 order attached to your pleadings?

3 MS. PATRICK: Yes, it is, and also . . . (microphone
4 not recording).

5 THE COURT: All right.

6 MR. MILLER: Your Honor, could we have a moment just
7 to look at the order?

8 THE COURT: Yeah, why don't you look at it.

9 MR. FRIEDMAN: Your Honor, may I comment on -

10 THE COURT: Yes.

11 MR. FRIEDMAN: At least for the RCT, and I'll let
12 the reclamation vendors speak for themselves, I do have some
13 concerns that the order may go beyond the scope of what is
14 actually being decided here and given the intensity of the
15 dispute here, would like to make sure that we don't end up
16 having a dispute among any of the parties regarding the
17 meaning of the language. Certainly, as to the granting of
18 the PCT's motion, the denial of the RCT's motion, I think
19 that seems clear from Your Honor's comments, but that whether
20 in paragraph (1), claims against any persons or entities who
21 are not reclamation creditors or the property of the PCT, I
22 question, Your Honor, whether the ruling now is to go beyond
23 the claims that have been asserted in the Texas litigation
24 and whether it's the intent to issue an order that goes
25 beyond that. Similarly, in paragraph (2), I don't know

1 whether the statement about standing really - and what might
2 be asserted in the Texas litigation goes beyond. There might
3 be issues related to standing that are somewhat other than
4 whether under the plan the -

5 THE COURT: Well, and I'm not sure, no person, I'm
6 not - the parties before me can't, but I'm not sure I can say
7 no person shall assert.

8 MS. PATRICK: Your Honor, the intent of that was as
9 follows: Many of the officers asked Judge Ward to stay his
10 ruling pending a decision by this Court.

11 THE COURT: Okay.

12 MS. PATRICK: And what I don't want to do is, having
13 asked and said, we want Judge Walrath to decide, I don't want
14 them having been disappointed in your decision to come back
15 and say to Judge Ward, disregard what the Bankruptcy Court
16 did. We want another bite at the apple.

17 THE COURT: Well, isn't that something you address
18 with Judge Ward, not me.

19 MS. PATRICK: Well, I think it is, Your Honor -

20 THE COURT: Are they parties here?

21 MS. PATRICK: Huh?

22 THE COURT: I'm not sure they're parties to this
23 action here.

24 MS. PATRICK: Well, it's a problem, Your Honor, I
25 grant, but I don't want - I'm very -

1 THE COURT: I know what you want, yeah.

2 MS. PATRICK: I know. I'm always very clear about
3 what I want. The issue is, I don't want serial motions and I
4 don't want a bunch of delay and you have heard here people
5 speak for Peter Frank in this Court on that issue. People
6 have identified themselves as counsel for Mr. Frank. And so,
7 you know, from my perspective, Your Honor, the ownership
8 issue has been decided. This is a question in rem that was
9 for this Court. The claims are owned by us, and that is it.
10 That's the nature of the motion.

11 THE COURT: Well, I'm inclined to strike paragraph
12 (2) and modify paragraph (1) just to say the claims against
13 the vendor officers are not - who are not reclamation
14 creditors are property of the PCT.

15 MR. FRIEDMAN: I understand that, Your Honor, and
16 again to the balance of it - But also paragraph (3), Your
17 Honor, I think that - I don't know what efforts to interfere
18 might be but I don't think there's been any effort to
19 interfere whatsoever. We came to this Court and asked for
20 this Court to make a ruling, and I don't think it's
21 appropriate based on that to enter an injunction against us,
22 against the RCT for any efforts to interfere with the
23 prosecution of the claims. I don't know what that might
24 mean. Certainly -

25 THE COURT: I think you're already subject to

1 whatever injunction the confirmation order has and the plan
2 has.

3 MS. PATRICK: Right, and my only concern, Your
4 Honor, is I didn't want the RCT having come to this Court to
5 go down to Judge Ward and try to re-trade or unwind the
6 Court's ruling, and so that's my concern. I take your point
7 that it's governed by the plan, and I don't expect that the
8 RCT will appear in front of Judge Ward to reargue the
9 ownership issue and if they do, I'm sure that this Court
10 would have something to say about that.

11 THE COURT: All right. I would strike paragraphs
12 (2) and (3) and the clause "and claims against any persons or
13 entities" that is in paragraph (1).

14 MR. HILDEBRAND: I have a further question about the
15 scope of the order. Consistently, your oral ruling, Your
16 Honor, an expressed concern for sorting out the issues later
17 on as to what extent a vendor like Kraft has been released
18 from a portion of any judgment that may lodge against Mr.
19 Adams, could we have language to the effect that to the
20 extent Mr. Adams caused injury to the debtors while acting
21 within the scope of his employment at Kraft, the RCT has
22 settled and resolved those damages to the debtors?

23 MS. PATRICK: Your Honor, that's exactly what we're
24 here about, and the answer ought to be, I think, plainly
25 under the plan, no. Judge Ward will decide and the jury will

1 decide what liability Mr. Adams has, if any, for his tortuous
2 acts and any credit on the judgment that is to be applied, is
3 for Judge Ward to be applied. I would like very much to try
4 my case before somebody starts talking about what my judgment
5 ought to look like.

6 MR. HILDEBRAND: I'm wondering, Your Honor, what it
7 is exactly that the RCT released then.

8 THE COURT: Their direct claim against you.

9 MS. PATRICK: Released as to the full extent of RCT
10 assets. They released what they had.

11 THE COURT: Their claim against you.

12 MR. HILDEBRAND: And - but doesn't that include any
13 damages caused by Kraft's employee?

14 THE COURT: No. No.

15 MR. HILDEBRAND: Okay.

16 THE COURT: No. Just as it doesn't include any
17 damages caused by Fleming employee on their side of the
18 alleged fraudulent transaction.

19 MR. HILDEBRAND: All right, Your Honor.

20 MR. RALSTON: Your Honor, we're satisfied with the
21 deletions of paragraphs (2) and (3). We would just note for
22 the record, I do not represent John Robinson, the Dean Foods
23 officer who is the defendant in the underlying suit. One of
24 the concerns I was going to raise and the Court addressed it,
25 was the *res judicata* issue, in my mind, has not been decided,

1 as to the issue as to whether the plan preserved the claims.
2 I don't believe we have necessarily have standing to even
3 bring that issue before the Court since to the extent that it
4 would be with the RCT if we had that issue. Mr. Robinson may
5 have that issue with the PCT, and I believe that the issue as
6 to whether the plan preserved the claims in and of themselves
7 sufficiently would be probably for Judge Ward to decide.

8 MS. PATRICK: Your Honor, if I may. I could not
9 disagree more. They explicitly raised in their pleadings
10 whether these claims had been preserved in the plan. We
11 argued that the claims had been preserved and that they were
12 the property of the PCT. Whether these claims are preserved
13 or not, is for this Court. It was here in the RCT's motion.
14 There is no question about that. That issue is dead.

15 MR. MILLER: Your Honor, I'll respond to that
16 because we did raise it in ours on behalf of Kemps, and the
17 issue has not been raised here. In their - The RCT did not
18 raise it in their motion, and the response that we filed in
19 support of the motion in footnote 5 - well, I can read the
20 language to you, but in essence, what we did is said that the
21 issue before the Court today is not whether or not this claim
22 survives or whether it exists. It's who has the right,
23 should it continue. So, I think that to make it clear,
24 paragraph (1) should say, "to the extent such claim exists".
25 And the issue of whether or not the claim exists is for

1 another day.

2 THE COURT: Well, who's going to decide it? Me.

3 MR. MILLER: No, I think, Your Honor, that's an
4 issue for the Texas Court to decide when it's raised whether
5 or not that cause of action existed due to confirmation of
6 the plan. It's similar, Your Honor, to the situation that
7 was raised before Your Honor in Worldwide Direct.

8 THE COURT: Yeah.

9 MR. MILLER: When we represented PWC and Your Honor
10 advised the trustee in that situation, who had brought it
11 back to your court for an interpretation, quite frankly, of
12 the plan, as to what it meant. Your Honor correctly stated,
13 That's for another court to determine what *res judicata*
14 effect the plan and the order states.

15 THE COURT: Well, is this not a case where the
16 question is whether or not the disclosure statement
17 adequately stated the claims that were being preserved
18 against creditors and others?

19 MR. MILLER: And does the plan adequately provide
20 for the retention of that cause of action to some party, and,
21 I guess, we've decided that, and to the extent that it does
22 exist, it's the PCT's asset. All I'm saying is that whether
23 that cause of action survived is for another court to decide
24 based upon an interpretation and reading of this plan.

25 THE COURT: Well, I don't remember the Worldwide

1 decision where I didn't decide it. I have decided that issue
2 in other cases. I don't know why I wouldn't decide that
3 issue.

4 MR. MILLER: We did not - Your Honor, whether or not
5 -

6 THE COURT: What is the argument that it is not
7 preserved?

8 MR. MILLER: I'm sorry?

9 THE COURT: What is the argument that it is not
10 preserved by the description that's in the disclosure
11 statement.

12 MR. MILLER: Well, we didn't brief the issue, Your
13 Honor, so I'm not in a position to tell you all the reasons
14 why we would believe that it may not have been. And once
15 again, I do not represent those individuals. So, I can't
16 speak on their behalf. They've admitted that they're not
17 bringing the action against my client, which is Kemps. But
18 it seems to me that those people aren't represented here. We
19 put in our footnote that we're not addressing that issue, but
20 that issue should be reserved. They addressed the issue in
21 their reply that they filed, but, you know, that's not how it
22 came about. Ours was very clear that we were not addressing
23 the issue. We'd raise it at another time to the extent that
24 became an issue. So, at issue today, was whether or not the
25 RCT or the PCT had this cause of action to the extent the

1 cause of action existed.

2 MS. PATRICK: Your Honor, at page 33 of our opening
3 brief, the cross-motion says, and I quote, "The PCT is
4 entitled to the entry of an order declaring that it owns the
5 claims it has filed. There is an explicit plan provision
6 conferring these claims on the PCT. These claims were not
7 discharged, and the existing plan injunction and the
8 confirmation order requires the PCT to maximize these claims
9 for the benefit of its creditors." The existence and
10 preservation of the claims is in our cross-motion, and Kemps'
11 counsel in their reply brief, it was they who made the
12 argument that the claims were not preserved because they
13 weren't listed on Exhibit A. I didn't come up with that
14 myself. That is the argument that they made, which is why I
15 pointed the Court to the retained claim language and the
16 expressed statement that Exhibit A is not the sole means by
17 which preservation is determined. They joined issue on this.
18 They have made allegations in the opening brief about the
19 disclosure statement not preserving these claims. We have
20 briefed it expressly. It is before the Court. It is not for
21 Judge Ward. It is for this Court to decide and to decide
22 now.

23 MR. MILLER: Well, I'll point to footnote 8 of our
24 reply, that says, "The issue of whether the EO claims against
25 Green, Thorp, and Kemps were adequately preserved in the plan

1 and disclosure statement, it's not currently before the Court
2 on the RCT's motion. Kems has not waived raising such
3 issues at a later appropriate time. Accordingly, Kems
4 hereby denies any liability with respect to the EO claims,
5 and hereby reserves all of its rights to contest the EO
6 claims and the availability of them to parties to assert the
7 EO claims against Green, Thorp, and/or Kems."

8 THE COURT: Well, I think I, of necessity, have to
9 determine whether the claims were preserved because
10 otherwise, my opinion here would be an advisory opinion.
11 Claims, if there are any, belong to PCT.

12 MR. MILLER: But, I think that people that are
13 represented here are representing the vendors.

14 THE COURT: Uh-huh.

15 MR. MILLER: And our position was that the indirect
16 causes of action against the employees, who we don't
17 represent, is not an asset that should be transferred to the
18 PCT but should be retained by the RCT. This, what they're
19 asking for, is a judgment or a ruling against people that
20 weren't represented here, that didn't file any pleading in
21 connection with that. And they should be able to raise
22 whatever defenses they would have. I mean, I don't represent
23 the two employees that are identified with respect to Kems.
24 I'm representing Kems.

25 THE COURT: All right.

1 MR. MILLER: Thank you, Your Honor.

2 MS. PATRICK: But, Your Honor, it's Kemps that made
3 the argument that the claims were not preserved. It's they
4 that made the argument about Exhibit A. It's - they made it
5 in their second brief in response to my cross-motion.

6 MR. HILDEBRAND: Your Honor, if I could speak.
7 Kraft certainly never reached this issue. Mr. Adams is not
8 before this Court, and that the premise of our motion,
9 certainly, was that Mr. Adams' claims conceptually were with
10 RCT and included in indirect causes of action. Now that this
11 Court has determined otherwise, Mr. Adams should be free to
12 argue whatever the plan gives him to say that the claims
13 against him individually were improperly disclosed and
14 preserved under the plan, particularly since they've assisted
15 on this formulated greeting where the vendors are separated
16 from their employees, it seems to me Mr. Adams is entitled to
17 go back and read the fine print and find out whether he's
18 separated for all purposes and dropped out of the picture.
19 So, at a minimum, he ought to be heard on that subject in
20 front of this Court, if you're going to decide it today.

21 MR. RALSTON: Your Honor, not to belabor the point.
22 This Court if it remembers the Worldwide direct decision, may
23 remember me sitting by Mr. Wilbinsky's side as you poured us
24 out, when we brought -

25 THE COURT: I don't remember it, unfortunately.

1 MR. RALSTON: Well, you did, and the *res judicata* -
2 this Court determined that the *res judicata* issue was
3 properly decided before the home court. I will tell you in
4 candor to the Court, as an officer of the Court, we did not
5 brief this issue on behalf of Dean Foods, and we certain
6 don't represent John Robinson. I don't know if Mr. Robinson
7 or his counsel desires to raise this issue or whether they
8 decided whether it would be before this Court or before the -
9 or Judge Ward's Court. But certainly, in candor to the
10 Court, we do not think that the *res judicata* issue as to a
11 preservation was before it. It was, rather, assuming that
12 those claims were preserved, who owned the claims. And,
13 again, I'm not going to exercise or engage in any exercise of
14 conjecture as to what Mr Robinson and his counsel wish to do
15 if such a claim is determined to exist. I don't know, I
16 haven't looked at the plan regarding the *res judicata* issue.
17 I just note that our briefing, and I don't think a fair
18 meeting of the any of the briefing indicates that that issue
19 was teed up before the Court. I think it's just the
20 ownership issue.

21 MR. BERGER: Your Honor, Neal Berger. Just one
22 point and one request. Your Honor, Ms. Pertchard and I
23 appear today for Food Marketing Group not for Peter Frank.
24 Your Honor had - that's my statement then as to the request.
25 Your Honor did say a number of times on the record that you

1 weren't pre-judging any of the allegations. You weren't
2 making any findings of fact. Your Honor has ruled on the
3 ownership of this cause of action, but as to other rights,
4 claims, and defenses, it would be appropriate in the order
5 that those be preserved. The transcript is lengthy, and I
6 want to be certain that any other court or any other party
7 looking at Your Honor's order is abundantly clear that Your
8 Honor did not make findings of fact as to the allegations and
9 any of the pleadings or in the arguments today.

10 MS. PATRICK: Your Honor, if I may just briefly. I
11 think the Court has been clear. There's no request for
12 findings of fact in any of the motions, and the Court has
13 said it has made none, but the plan specifically says that
14 *res judicata* shall not apply as a defense to any claim
15 preserved, and the Court is exactly right. The question
16 whether these claims exist is a necessary antecedent to the
17 ownership issue. Otherwise, it's just an advisory opinion,
18 and this is teed up here, and I do not think - people can
19 make whatever arguments they want to make in a district
20 court.

21 THE COURT: Well, how is it teed up?

22 MS. PATRICK: It's teed up in my cross-motion -

23 THE COURT: I've said these are not - I've said
24 expressly that these are not claims against the only parties
25 that are here. So, how can I make any conclusion with

1 respect to claims that are not against them?

2 MS. PATRICK: Well, the answer, Your Honor, is that
3 you are necessarily, when you say these are not claims
4 against reclamation creditors, the PCT has claims. I mean
5 inherent in that is something that is at issue. There was a
6 bone that was being argued about between these two dogs.

7 THE COURT: However, the dog in this fight isn't
8 here.

9 MS. PATRICK: Your Honor, the dog -

10 THE COURT: It's not their claims. One dog is here,
11 the other isn't here. These parties are not the dog in this
12 fight. I've made that - really.

13 MS. PATRICK: Let me say this, Your Honor. I think
14 it ought to be clear at least this much, that none of the
15 creditors who appeared here to argue that these claims were
16 not preserved, and certainly not the RCT, none of them who
17 actually litigated the question whether these claims were
18 preserved ought to be heard to argue or support a claim that
19 they were not preserved.

20 THE COURT: Well, they're not parties in interest.

21 MS. PATRICK: I understand and the only reason I
22 raise it, Your Honor, is because when I very pointedly said I
23 did not expect to see the RCT in Judge Ward's Court making
24 arguments, the silence was deafening from my left as to
25 whether any of these parties who chose to litigate here

1 intend to go make the same arguments in front of Judge Ward.
2 They should not be allowed, having teed up before Your Honor,
3 whether the claims were preserved and whether they owned them
4 to appear before Judge Ward and argue the contrary of this
5 Court's ruling.

6 THE COURT: Well, all I can say is that I can rule
7 that any claims that were preserved by the plan against the
8 vendor officers are the property of the PCT.

9 MS. PATRICK: Okay.

10 THE COURT: But I cannot make a ruling that would
11 effect the vendor officers without them being here.

12 MS. PATRICK: Okay.

13 THE COURT: All right?

14 MS. PATRICK: I think our order is still fine with
15 the deletions that you have.

16 THE COURT: And with the addition after claims of -
17 which were preserved by the plan. So it would read, Under
18 Fleming's plan of reorganization, any claims which were
19 preserved by the plan against the vendor officers who are not
20 reclamation creditors are the property of the PCT.

21 MR. HILDEBRAND: (Microphone not recording.)

22 THE COURT: All right, with those modifications
23 then, I'll enter the order.

24 MS. PATRICK: Your Honor, if you want, I think I
25 have -

1 THE COURT: I've made my changes.

2 MS. PATRICK: Okay.

3 THE COURT: All right, we're done?

4 MS. PATRICK: Thank you again for your courtesy to
5 me.

6 ALL: Thank you, Your Honor.

7 THE COURT: Thank you, we'll stand adjourned.

8 (Whereupon at 12:19 p.m. the hearing in this matter
9 was concluded for this date.)

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19 I, Elaine M. Ryan, approved transcriber for the
20 United States Courts, certify that the foregoing is a correct
21 transcript from the electronic sound recording of the
22 proceedings in the above-entitled matter.

23

24 /s/ Elaine M. Ryan
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